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No. 96-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

C. ELVIN FELTNER, JR.,

Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—as the Fourth, Seventh, and Eighth Circuits have held—the Seventh Amendment to the United States Constitution guarantees the right to trial by jury when the plaintiff in a copyright infringement action seeks statutory damages under 17 U.S.C. § 504(c), or whether—as the First, Second, Fifth, Eleventh, and now Ninth Circuits have held—there is no constitutional right to a jury trial in such a case.

PARTIES TO THE PROCEEDINGS

C. Elvin Feltner, Jr. was defendant-appellant below and is the petitioner in this Court.

Krypton Broadcasting of Birmingham, Inc., Krypton Broadcasting, Inc., Krypton International Corporation, Krypton Broadcasting of Ft. Pierce, Inc., Krypton Broadcasting of Jacksonville, Inc., North Florida 47, Inc., WTWV, Inc., Daniel S. Dayton, and Alfred F. DeCuir were defendants below. Krypton International was also an appellant below on issues unrelated to the question presented here. App. 2a n.2.

Columbia Pictures Television, Inc. was the plaintiff-appellee below and is the respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI

C. Elvin Feltner, Jr. petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 106 F.3d 284 and is reprinted in the appendix hereto ("App.") at 1a. The order of the District Court awarding judgment to respondent is unreported and is reprinted at App. 21a. The order of the District Court denying petitioner's motion for a jury trial was rendered orally; the docket entry evidencing that ruling is reprinted at App. 24a. The order of the District Court granting summary judgment in favor of respondent on the question of liability is unreported and is reprinted at App. 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1997. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 504(c) of Title 17, U.S.C., provides, in pertinent part:

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages * * * in a sum of not less than \$500 or more than \$20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware of and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.

INTRODUCTION

This petition asks the Court to resolve a longstanding, divisive conflict among the courts of appeals over the resolution of an important constitutional issue affecting the administration of the Nation's copyright law: whether the Seventh Amendment guarantees the right to a jury trial when a copyright plaintiff seeks statutory damages pursuant to 17 U.S.C. § 504(c). Eight circuit courts have now decided the question, and they are hopelessly divided. Five circuits, including the Court of Appeals in this case, have held that there is no such right, while three circuits have held that there is. This Court should resolve the conflict to ensure that the Constitution is applied uniformly throughout the Nation.

STATEMENT OF THE CASE

Petitioner Feltner owns Krypton International Corporation ("Krypton"), which in 1990 acquired three television stations in the southeastern United States. Respondent Columbia Pictures Television, Inc. ("Columbia") had licensed several television shows to the stations. Prior to Krypton's acquisition of the stations, Krypton and Columbia entered into discussions about restructuring the licensing arrangements, and protracted negotiations over such a restructuring continued from March 1990 until December 1991. During the course of those negotiations Columbia purported to terminate the licensing agreements, and filed suit when the stations—relying on the ongoing negotiations—continued to broadcast the programs. Columbia initially sued Feltner, Krypton, various Krypton subsidiaries, and certain Krypton officers under a variety of theories, but during the course of the litigation dropped all claims except its copyright infringement claims against Feltner.

The District Court entered summary judgment on liability in favor of Columbia on these claims, finding Feltner liable for copyright infringement arising from the television stations' airing of various episodes from four shows—"Who's The Boss?," "Silver Spoons," "Hart to Hart," and "T.J. Hooker." Pursuant to Section 504(c) of the Copyright

Act, Columbia thereupon elected statutory damages in lieu of actual damages. Under that provision, a "copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages * * * of not less than \$500 or more than \$20,000 as the court considers just." 17 U.S.C. § 504(c)(1). Section 504(c)(2) goes on to provide that "where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages" to not more than \$100,000, while "where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages" to not less than \$200. *Id.* § 504(c)(2).

Feltner demanded a jury trial on the various issues pertinent to the assessment of damages under Section 504(c), and Columbia filed a motion *in limine* requesting that the court reject Feltner's demand. R. 209. Feltner opposed that motion, arguing that he was entitled to a jury trial on the issue of statutory damages both as a matter of statutory interpretation and as a matter of constitutional right under the Seventh Amendment. Memorandum of Points and Authorities in Support of Defendant's Opposition to Plaintiff's Motion in Limine to Exclude Consideration of Defendant's Counterclaims and Motion to Confirm Bench Trial at 4-7 (Nov. 23, 1993). Over Feltner's objection, the District Court on December 13, 1993 granted Columbia's motion for a bench trial on the various issues pertinent to an assessment of statutory damages under Section 504(c). App. 24a. The court then held a two-day bench trial at which it heard witnesses and considered evidence on the issues of, *inter alia*, willfulness and innocent infringement. After trial the court concluded that Feltner had not established that his infringement was innocent and instead that Columbia had proved that the infringement was willful under Section 504(c)(2). The court found that each episode of the various television series aired by each station constituted a separate

violation, for a total of 440 acts of infringement, and fixed the statutory damages at \$20,000 per violation. Accordingly, the court awarded Columbia \$8,800,000 in damages, plus attorneys' fees. App. 21a.

On appeal, Feltner renewed his argument that he was entitled to trial by jury on the statutory damages issues, both as a matter of statutory interpretation and under the Seventh Amendment. App. 11a. The Court of Appeals rejected both arguments. First, relying on *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), it held that Congress did not intend for a jury to play any role in the assessment of statutory damages under Section 504(c). App. 11a-12a. The court then turned to Feltner's constitutional argument, concluding that "we agree with those cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature." App. 12a. The court cited cases from the Second, Fifth, and Eleventh Circuits, as well as the District of Delaware, in support of its holding. *Id.* (citing *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 852-853 (11th Cir. 1990); *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. 1981); *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369 (D. Del. 1990)).

The court, however, specifically acknowledged the conflict among the circuits on the question whether the Seventh Amendment guarantees a right to a jury trial on the issue of statutory damages, citing decisions from the Fourth and Eighth Circuits and the District of New Jersey as "holding that Seventh Amendment provides right to have jury assess statutory damages," contrary to its own holding and the holdings of the cases on which it relied. App. 12a (citing *Cass County Music Co. v. C.H.L.R., Inc.* 88 F.3d 635 (8th Cir. 1996); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119-121 (4th Cir. 1981); *Educational Testing Servs. v. Katzman*, 670 F. Supp. 1237 (D.N.J. 1987)). The Ninth Circuit also noted the conflicting decision of the Seventh

Circuit in *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014-16 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991), which it described as "holding that the amount of statutory damages is decided by the court but the issue of willfulness should be tried to the jury." App. 12a.¹

The Ninth Circuit then went on to uphold the District Court's finding of willfulness. The court ruled that "Feltner's arguments, at best, demonstrate that the facts presented to the district court were susceptible to more than one interpretation," and concluded that "we cannot say that the district court's finding was clearly erroneous." App. 13a. The Court of Appeals rejected Feltner's challenge to the amount of the award, finding the award of \$20,000 per violation to be "well within the statutory limits and * * * not an abuse of discretion." App. 18a.²

¹ The Court of Appeals quite rightly did not accept Columbia's suggestion that it could avoid the issue because the District Court's award was \$20,000 per violation, which the District Court could have awarded under Section 504(c) without an enhancement for willfulness. As Feltner explained, the District Court also rejected Feltner's claim of innocent infringement, and in any event the finding of willfulness plainly factored into the ultimate award, which was determined by the court rather than a jury as Feltner had requested.

² Feltner also challenged the District Court's award of attorneys' fees, on the ground that the court failed to provide any explanation for its award. The Court of Appeals agreed that this was error, vacated the award of fees, and remanded so that the District Court could provide a reasoned explanation for its award. App. 19a. The pendency of these wholly collateral proceedings do not affect the finality of the Court of Appeals' judgment or this Court's jurisdiction to entertain this petition. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 390 (1990) (reviewing court of appeals' judgment notwithstanding remand on attorneys' fee issues); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (attorneys' fee issues are collateral to merits); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (reviewing court of appeals' refusal to issue writ of mandamus requiring jury trial); *see also* 28 U.S.C. § 1254 (Supreme Court has jurisdiction to review any "[c]ases in the courts of appeals").

REASONS FOR GRANTING THE WRIT

The question presented by this case is straightforward: In a copyright infringement action where the plaintiff elects to seek statutory damages pursuant to 17 U.S.C. § 504(c), does the defendant have a right to a trial by jury? While this legal question is simple to state, its resolution has provoked an irreconcilable and enduring conflict among no fewer than eight circuit courts. Including the Court of Appeals in this case, five circuits—the First, Second, Fifth, Ninth, and Eleventh—have held that there is no right to a jury trial on any issues when a copyright plaintiff elects statutory damages. Three circuits—the Fourth, Seventh, and Eighth—have held that the Seventh Amendment guarantees such a right, with the Seventh Circuit adopting a hybrid view that guarantees a jury trial on all issues except the amount of damages. This stark conflict over an important issue of constitutional law has been expressly acknowledged by the circuit courts, and has deepened in recent years with no prospect of resolution unless this Court intervenes. The question is squarely presented in this case. Accordingly, the Court should grant certiorari to resolve this longstanding conflict and ensure that the Seventh Amendment is applied uniformly throughout the lower courts.³

³ In addition to the conflict on the Seventh Amendment question, there is confusion in the lower courts as to whether Section 504(c) itself guarantees a jury trial. Most courts have held that the statute does not resolve the question. *See, e.g., Cass County*, 88 F.3d at 641; *Video Views*, 925 F.2d at 1013-14; *Gnosso*, 653 F.2d at 119. Other courts have held that the statute requires a bench trial. *See, e.g., Sid & Marty Krofft*, 562 F.2d at 1177; *Oboler*, 714 F.2d at 213. And at least one court has held that the statute requires a jury trial. *See Mail & Express Co. v. Life Pub. Co.*, 192 F. 899, 900 (2d Cir. 1912) (construing predecessor to Section 504(c)); *see also* William Patry, *The Right to a Jury in Copyright Cases*, 29 J. Copyright Soc'y 139 (1981) (concluding that Congress intended to preserve right to a jury trial in actions seeking statutory damages).

This Court has made clear that this statutory question should be addressed before any Seventh Amendment inquiry. *See Tull v. United States*, 481 U.S. 412, 417 n.3 (1987); *Lorillard v. Pons*,

I. THE COURT SHOULD RESOLVE THE LONGSTANDING, IRRECONCILABLE, AND WIDESPREAD CONFLICT AMONG THE CIRCUIT COURTS ON THE QUESTION PRESENTED

Section 504(c)(1) of the Copyright Act of 1976 provides, in pertinent part, that a copyright owner "may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages * * * in a sum of not less than \$500 or more than \$20,000 as the court considers just." 17 U.S.C. § 504(c)(1). If the copyright owner proves that the infringement was willful, the maximum statutory damages are increased to \$100,000, while if an infringer proves that the infringement was innocent, the minimum statutory damages are decreased to \$200. *Id.* § 504(c)(2).

As explained below, the circuit courts are sharply divided over whether the Seventh Amendment guarantees a right to a jury trial when a plaintiff elects such statutory damages and, if there is such a right, whether it extends to all or only some issues under Section 504(c). The issues to be determined under Section 504(c) include whether the infringement was innocent, whether it was willful, and what amount of damages should be assessed. Five circuits have held that there is no right to a jury trial on any issues, two circuits have held that there is a right to a jury trial on all issues, and one circuit has held that there is a right to a jury trial on all issues except the amount of damages. The opinions from these courts leave no doubt as to the existence of an irreconcilable conflict that only this Court can resolve.

A. The Conflict Is Widespread And Persistent

1. The circuit courts have adopted three distinct positions on the question presented here. The view espoused by

434 U.S. 575, 577 (1978). Accordingly, while this petition focuses on the widespread conflict on the Seventh Amendment question, the statutory issue is "fairly included within" the question presented. S. Ct. Rule 14.1(a).

the Court of Appeals in this case—that the Seventh Amendment does not guarantee a right to a jury trial on any issue when a plaintiff elects statutory damages—was first articulated by the First Circuit in *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77 (1st Cir. 1957). The court in that case—after noting that the seeming simplicity of the issue was "deceptive," *id.* at 78—held that a claim seeking statutory damages is "in its entirety a claim invoking the equity jurisdiction of the district court, so that defendant had no right to demand a jury trial in any aspect of the claim." *Id.* at 81.⁴

The next circuit court to address the issue was the Fifth Circuit in *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6 (5th Cir. Unit B May 1981) (per curiam). In that case, in which the plaintiff sought statutory damages under Section 504(c), the court rejected the defendants' argument that they were entitled to a jury trial, holding that "[t]he whole case before the Court [is] equitable in nature as to which the appellant had no constitutional or statutory right to a jury trial." *Id.* at 7 (citing *Chappell*).

The Fifth Circuit's decision was binding on the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Thus, in *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990), the Eleventh Circuit expressly followed *Twentieth Century Music* and extended its holding to the statutory damages provision of the Communications Act of 1934. As the court held, "the latitude granted the district court's great discretion in awarding damages does not entitle defendants to a jury or bench trial as to an award of damages within the statutory limits of both the Copyright Act and the Communications Act, provided that the parties may

⁴ *Chappell*, unlike the other circuit court cases discussed below, was decided under the Copyright Act of 1909. The 1909 Act was replaced by the Copyright Act of 1976, but the two statutes contain nearly identical statutory damages provisions and no court has ever suggested that such differences affect the Seventh Amendment issue. See *Cass County*, 88 F.3d at 639 n.2.

submit all of their supporting evidence to the district court." *Id.* at 852-853.

The Second Circuit weighed in on the issue in *Oboler v. Goldin*, 714 F.2d 211 (2d Cir. 1983) (per curiam). In that case, the court vacated a district court's directed verdict on damages because the plaintiff had not made an election as to actual or statutory damages. In doing so, the court noted that an election of statutory damages would not necessitate a new trial because "[t]he determination of statutory damages, including a fivefold increase in the maximum award if the plaintiff proves and the court finds willful infringement, is assigned by statute to the judge rather than the jury." *Id.* at 213. As support for this proposition, the court cited a commentator who had contended that this was perhaps the "better view," see 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.04[C] at 14-63 (1996), but the Second Circuit expressly noted that the Fourth Circuit had reached the opposite conclusion in *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117 (4th Cir. 1981) (discussed *infra*). See *Oboler*, 714 F.2d at 213 (citing *Gnossos* and earlier edition of Nimmer).⁵

In the present case, the Ninth Circuit firmly aligned itself with this view. After rejecting petitioner's statutory argument on the authority of its prior holding in *Sid & Marty*

⁵ Thus, although the *Oboler* court did not expressly refer to the Seventh Amendment, its citations indicate that it considered the constitutional issue. Subsequent cases, moreover, have confirmed that *Oboler* forecloses any attempt in the Second Circuit to demand a jury trial where statutory damages are sought. See, e.g., *Janus Films, Inc. v. Miller*, 801 F.2d 578, 580 (2d Cir. 1986) (noting that district court struck jury demand under *Oboler*); *Latin American Music Co. v. Spanish Broadcasting Systems, Inc.*, 866 F. Supp. 780, 782 & n.1 (S.D.N.Y. 1994) ("[The plaintiff's] argument that it is entitled to a jury trial even with respect to its claim for statutory damages is frivolous, in light of the Second Circuit cases that are directly on point.") (citing *Oboler*); *Broderbund Software, Inc. v. Megatronics, Inc.*, 859 F. Supp. 640, 640 (E.D.N.Y. 1994) ("Because plaintiffs seek injunctive relief and statutory damages * * * defendants are not entitled to a jury trial.") (citing *Oboler*).

Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977), the court below held:

As for Feltner's contention that the district court's ruling deprived him of his Seventh Amendment right to a jury trial, we agree with those cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature. [App. 12a.]

As support for its holding, the court cited the Eleventh Circuit's decision in *Cable/Home*, the Second Circuit's decision in *Oboler*, and the Fifth Circuit's decision in *Twentieth Century Music*, as well as a district court decision from the Third Circuit, *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369 (D. Del. 1990). However, in "agree[ing] with those cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages," the court expressly acknowledged that three other circuits had reached a contrary conclusion. See App. 12a. As explained below, the holdings of those circuits—the Fourth, Seventh, and Eighth—sharply diverge from the holding of the Court of Appeals in this case.

2. As the Court of Appeals recognized, two circuits have reached the opposite conclusion that the Seventh Amendment guarantees the right to a jury trial on all issues when a plaintiff seeks statutory damages under Section 504(c). In *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117 (4th Cir. 1981), the Fourth Circuit held that the Seventh Amendment compels a jury trial in such cases because (among other reasons) "a civil action seeking damages for copyright infringement under 504(c) is basically an action for the enforcement of a legal right," and because Section 504(c) "provides a remedy of a type which traditionally would have been enforced at law." *Id.* at 120. Therefore, the court concluded, the Seventh Amendment "mandates a trial by jury" on all issues when a plaintiff elects statutory damages. *Id.* at 121.

The conflict on this question, which had been brewing at least since *Gnossos*, came to a head last year when the Eighth

Circuit entered the mix in *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996). In that case, the court—summarizing the six other circuit court decisions that had decided the issue as of that time—expressly noted “the diverging opinions of our sister circuits” on the question “whether a party is entitled to a jury trial in a copyright infringement suit when the plaintiff seeks statutory damages as a remedy.” *Id.* at 640. Addressing the question for itself, the court concluded in a thoroughly-reasoned opinion that “either party in a copyright infringement suit is entitled under the Seventh Amendment to a jury trial on demand,” regardless of whether the plaintiff seeks actual or statutory damages. *Id.* at 644. The court made clear that, in its view, the right to a jury extends to *all* issues, including the amount of statutory damages. The Court noted that there is “fact-finding involved in fixing a damage award within the [statutory] range,” and that the plaintiff had “alleged facts that a jury might well find relevant in selecting a figure between \$500 and \$20,000,” including assertions that the plaintiff did not profit from the infringements. *Id.* at 643-644. Thus, the court held that “[a] party should be entitled to have a jury make factual findings relevant to determining the amount of damages to be assessed, whether they are actual damages or statutory damages.” *Id.* at 644.

In rejecting the views of the circuits finding no such right, the Eighth Circuit relied on several points. Applying the relevant factors identified in this Court’s Seventh Amendment decisions, the court first noted that “patent and copyright infringement actions are sufficiently analogous to conclude that, as patent infringement is a legal action to be tried to a jury, so is copyright infringement.” *Cass County*, 88 F.3d at 642. The court next noted that “the assessment of damages, whether actual or statutory * * * is easily performed by a jury in the ordinary copyright infringement case.” *Id.* Finally, the court considered the nature of the statutory damages remedy and concluded, like the Fourth Circuit in *Gnossos*, that “as is true with most money damages, statutory damages for copyright infringement are a legal remedy.” *Id.* at 643. In so holding, the court relied on

the fact that statutory damages in copyright actions are intended “not only to put the plaintiff in the position he would have been but for the infringement, but also, and arguably preeminently, to punish the defendant * * *.” *Id.* Accordingly, because “the award of punitive damages traditionally is a jury matter,” the court held that the question of statutory damages must be left to the jury as well. *Id.*

3. The Seventh Circuit has staked out yet another position. In *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991), the court noted that whether there is a right to a jury trial when a copyright plaintiff elects statutory damages “has been the subject of some conflict among (and within) the circuit courts of appeal that have touched upon it.” *Id.* at 1014 (citing, *inter alia*, *Chappell*, *Oboler*, *Gnossos*, *Twentieth Century Music*, and *Cable/Home*). The court then held that there is no right to have a jury determine the *amount* of statutory damages, but that the Seventh Amendment guarantees a jury trial on all other issues—including the questions of infringement and willfulness. As the court held:

We conclude that, when monetary damages of any kind are sought, the issues of infringement and willfulness are for the jury to resolve. The fact that the district court is given the responsibility to assess the statutory damages does not, without more, transform the proceeding—one in which monetary relief is sought—from one legal in nature to one equitable in nature. [*Id.* at 1016.]

In reaching this conclusion, the Seventh Circuit first held that “it is for the district court and not for a jury to determine the appropriate award of statutory damages,” expressly noting that its conclusion conflicted with the Fourth Circuit’s holding in *Gnossos*. *Id.* at 1014. The court then applied the three-factor test suggested by this Court in *Ross v. Bernhard*, 396 U.S. 531, 538 n. 10 (1970),⁶ and held that there is a right

⁶ That test considers (1) custom before the merger of law and equity; (2) the nature of the remedy sought; and (3) the practical abilities and limitations of juries. *Id.*

to a jury trial on the "underlying factual issues of infringement and willfulness." 925 F.2d at 1014. Like the Fourth Circuit in *Gnossos* and the Eighth Circuit in *Cass County*, the Seventh Circuit concluded that these issues are not beyond the practical abilities of juries, *id.* at 1015; that an action for copyright infringement "is analogous to recovery for a number of tort actions recognized at common law," *id.* (quoting *Gnossos*, 653 F.2d at 120); and that the statutory damages remedy was intended in part to serve the goals of deterrence and punishment, which are generally considered legal remedies requiring a jury, *id.* at 1016.

The Seventh Circuit, however, did not explain why these same considerations did not also guarantee a right to a jury trial on the question of the *amount* of statutory damages. We believe the Seventh Circuit's reasoning compels the conclusion that a jury trial is required on *all* issues when a plaintiff seeks statutory damages, and would therefore urge the Court to adopt the position of the Fourth and Eighth Circuits. But even if the Court were to adopt the Seventh Circuit's approach in this case, the judgment below could not stand. In this case, unlike in *Video Views*, the district judge denied a jury trial on any issues relating to the imposition of statutory damages, including the critical questions of willfulness and innocent infringement. The Court of Appeals upheld this ruling, and affirmed the District Court's willfulness findings under the "clearly erroneous" standard of review. App. 13a. Accordingly, even under the Seventh Circuit's hybrid approach, Feltner was improperly denied a jury trial on these factual issues.

4. In light of the sharply diverging holdings of the eight circuit courts that have considered the issue, the existence of a conflict on the question presented cannot be disputed. Ever since the conflict first surfaced with the Fourth Circuit's decision in *Gnossos*, every circuit to have independently addressed the issue—including the Court of Appeals in this case—has expressly noted the conflicting views of the other circuits without attempting to distinguish the facts of those cases in any way. See App. 12a; *Cass County*, 88 F.3d at

640; *Video Views*, 925 F.2d at 1014; *Oboler*, 714 F.2d at 213. Indeed, the Eighth Circuit recognized "the diverging opinions of our sister circuits," *Cass County*, 88 F.3d at 640, and the Seventh Circuit noted that the "question has been the subject of some conflict among (and within) the circuit courts of appeal that have touched upon it." *Video Views*, 925 F.2d at 1014. Numerous district courts have likewise noted the existence of the sharp conflict,⁷ as have numerous commentators.⁸ The commentators are themselves divided

⁷ See, e.g., *Wood v. Crosby Arboretum Foundation*, 793 F. Supp. 716, 716-717 (S.D. Miss. 1992) (noting the "divergence of opinion within the various circuits"); *Raydiola*, 729 F. Supp. at 373 ("The lower courts are divided on the question of whether there is a Seventh Amendment right to a jury trial for copyright infringement where the copyright owner seeks only an injunction and statutory damages."); *Educational Testing*, 670 F. Supp. at 1238 (issue "has been the subject of conflict between both courts and commentators") (footnotes omitted); *PGP Music v. Davric Maine Corp.*, 623 F. Supp. 472, 472 (D. Me. 1985) ("Courts outside this circuit have split on the issue, and there is a significant amount of learned discourse on each side.").

⁸ See Robert A. Gorman & Jane C. Ginsburg, *Copyright for the Nineties* 675-676 (4th ed. 1993 & Supp. 1996) (noting conflict on "significant issue"); Nancy J. Niemeier, *The Right to Trial By Jury in Copyright Infringement Suits Seeking Statutory Damages*, 17 S. Ill. U. L.J. 135, 135 (1992) ("The United States Courts of Appeals are split—the score is five to two"); Ted J. Feldman, *An Examination of the Right to Jury Trial Where Copyright Statutory Damages Are Elected*, 21 Hofstra L. Rev. 261, 261 (1982) ("Courts within the various circuits have been in disagreement for decades as to whether there is a right to a jury trial in copyright infringement actions where statutory damages are elected in lieu of actual damages under the Copyright Act."); Andrew W. Stumpff, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment*, 83 Mich. L. Rev. 1950, 1952 (1985) (noting "disagreement among the circuits"); Wendy K. Breuninger, *Statutory Damages and Right to Jury Trial in Copyright Infringement Suits*, 24 IDEA 249, 258 (1983) ("The current case law is developing in two separate patterns at complete odds with each other. As such, the matter is ripe for the Supreme Court to resolve."); David Phippen, *Right to Jury Trial Under Copyright Act's Statutory Damage Provision*, 34 Wash. & Lee L. Rev. 800, 800 (1982) ("Federal courts are split on

over the proper resolution of the issue.⁹

B. The Conflict Is Ripe For This Court's Resolution

The question presented by this case is plainly not an issue that requires further "percolation" before this Court accepts review, nor is the conflict one that might resolve itself without this Court's intervention. Of the twelve circuits that could conceivably express an opinion on the subject, eight have definitively resolved the issue and they have split 5-2-1, with two of the three most recent opinions finding a Seventh Amendment right. Thus, even if the remaining four circuits were to weigh in at some point, the conflict could only deepen. Meanwhile, the district courts within one of those circuits—the Third—are themselves hopelessly divided on the question. *Compare Educational Testing*, 670 F. Supp. at 1238 and *Broadcast Music, Inc. v. Moor-Law, Inc.*, 203 U.S.P.Q. 487, 488 (D. Del. 1978) (both finding right to jury trial) with *Raydiola*, 729 F. Supp. at 373, *Rodgers v. Eighty Four Lumber Co.*, 623 F. Supp. 887 (W.D. Pa. 1985), and *Glazier v. First Media Corp.*, 532 F. Supp. 63 (D. Del. 1982) (all finding no right to jury trial). In fact, one might have thought the Court would have resolved this persistent conflict

the issue whether the Copyright Act of 1976 contains a constitutional or statutory right to a jury trial in actions where the plaintiff claiming copyright infringement seeks statutory, but not actual damages."); Patry, *supra*, at 194 ("In view of the split among the Courts of Appeals and the district courts, it is earnestly hoped that the Supreme Court will grant certiorari when sought in one of these cases, and resolve the question.").

⁹ Some commentators espouse petitioner's view that the Seventh Amendment guarantees a trial by jury on all issues when the plaintiff elects statutory damages. See Phippen, *supra*, at 807; Patry, *supra*, at 193-194. Others contend that there is no right to a jury on any issues. See Stumpff, *supra*, at 1970; 3 Nimmer & Nimmer, *supra*, § 14.04[C] at 14-63 (1996) ("perhaps the better view"). And one commentator advocates the Seventh Circuit's hybrid approach. See Niemeier, *supra*, at 151. See also Feldman, *supra*, at 282-283 (jury trial should be afforded either on all issues or at least issues other than amount of damages).

years ago, but the present petition is apparently the first time the Court has been asked to consider the issue.¹⁰

There is likewise no indication that any circuit is likely to change its position on this issue. To the contrary, the Seventh and Eleventh Circuits have expressly reaffirmed their positions in subsequent cases. See *Mitek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1553 (11th Cir. 1996); *Calderon v. Witvoet*, 999 F.2d 1101, 1109 (7th Cir. 1993). Nor is this an instance where the lower courts have relied on different precedents to reach their conclusions, raising the possibility that courts might re-examine earlier opinions in light of more recent decisions of this Court. Rather, the circuit courts that conducted an independent analysis of the issue generally considered the same precedents of this Court and examined the same general factors. See *Cass County*, 88 F.3d at 641-644; *Video Views*, 925 F.2d at 1014-17; *Twentieth Century Music*, 645 F.2d at 7; *Gnossos*, 653 F.2d at 119-121.¹¹ Likewise, the Court of Appeals in this case expressly followed the decisions of other circuits on the issue. See App. 12a; see also *Cable/Home*, 902 F.2d at 852-853

¹⁰ A petition for certiorari was filed in only one of the previous circuit cases discussed above—*Video Views*—but that petition was filed by the party that prevailed on the Seventh Amendment question and therefore did not raise that issue. See Petition for Writ of Certiorari, *Studio 21, Ltd. v. Video Views, Inc.*, No. 91-102 (filed July 15, 1991).

¹¹ The only conceivable exception might be the First Circuit's decision in *Chappell*. As the Eighth Circuit noted in *Cass County*, because the First Circuit relied on the fact that statutory damages were sought together with an injunction, *Chappell's* holding is questionable following *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). See *Cass County*, 88 F.3d at 639; see also *Educational Testing*, 670 F. Supp. at 1238 n.4; *Chappell & Co., Inc. v. Pumpernickel Pub., Inc.*, 79 F.R.D. 528, 529 (D. Conn. 1977). Yet a district court in the First Circuit has declined to "deviate from the course set by the First Circuit Court of Appeals long ago," *PGP Music*, 623 F. Supp. at 473, and the First Circuit itself has not indicated any intention to do so. But even if the First Circuit were to reconsider *Chappell* and find a Seventh Amendment right, the conflict among the circuits would not be lessened.

(following *Twentieth Century Music*). Thus, the opposing positions are clearly staked out, and they are irreconcilable.

In fact, the Seventh Circuit—far from indicating a willingness to reconsider the issue—has determined to hold to its view and has all but invited this Court to resolve the confusion engendered by the Court's somewhat murky Seventh Amendment jurisprudence. In *Calderon, supra*, the Seventh Circuit applied its holding in *Video Views* to another statute, the Migrant and Seasonal Agricultural Worker Protection Act of 1983, which contains a similar statutory damages provision. In so holding, however, Judge Easterbrook noted that:

We acknowledged in *Video Views* that there are cases the other way. Having considered the arguments fully in *Video Views*, we shall hold fast unless instructed otherwise by the Supreme Court. That institution has been having difficulties of its own defining the meaning of "suits at common law," frequently unable to assemble a majority. Thus we adhere to the conclusion of *Video Views* that either side may demand a jury in a suit seeking statutory liquidated damages. [*Calderon*, 999 F.2d at 1109 (citations omitted).]

The time has plainly come for this Court to decide the question. The Court has explained that a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals." *Braxton v. United States*, 500 U.S. 344, 347 (1991). See S. Ct. Rule 10(a). This role is particularly important when the conflict concerns a constitutional question, because in such a case only this Court can resolve the conflict. Here there can be no dispute that the circuits are in sharp conflict over the constitutional question presented. This is not a case in which the existence of a circuit conflict needs to be inferred from an analysis of allegedly conflicting cases. Here the courts of appeals themselves have squarely acknowledged the conflict. The conflict is clear and widespread and the present intolerable confusion will persist unless this Court provides a resolution.

II. THE CONSTITUTIONAL QUESTION IS IMPORTANT AND RECURRING AND THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING IT

The conflict, moreover, is over an important and recurring question. As this Court has recognized, "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres*, 359 U.S. at 501 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). This Court has accordingly granted certiorari in the past when a circuit conflict has developed over whether the Seventh Amendment guaranteed a jury trial under a federal statute. See, e.g., *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 549-550 & n.2 (1990) (conflict between two circuits); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 563 (1990) (conflict among five circuits); *Tull v. United States*, 481 U.S. 412, 417 (1987) (conflict between two circuits); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 325 & n.3 (1979) (conflict between two circuits); *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (conflict among three circuits); *Ross*, 396 U.S. at 532 (conflict between two circuits). The conflict on the present question is at least as persistent as the conflicts upon which the Court granted review in those cases, and is significantly more widespread. As in those cases, the Court should not allow the meaning of the Seventh Amendment to continue to vary depending on the circuit in which an action has been brought.

In addition, the resolution of the Seventh Amendment conflict is critical to the proper administration of the Nation's copyright laws. The numerous cases cited above demonstrate that the question presented is a frequently recurring one in both the district and circuit courts. Every copyright plaintiff has the absolute right to elect between actual and statutory damages, and when a plaintiff elects statutory damages the question presented here will arise whenever either party desires a jury trial. Nor is the effect of the conflict limited to the Copyright Act. The courts of appeals have already

applied their divergent holdings on Section 504(c) to other statutes containing similar statutory damages provisions. See *Calderon*, 999 F.2d at 1109 (applying holding in *Video Views* to Migrant and Seasonal Agricultural Worker Protection Act of 1983); *Cable/Home*, 902 F.2d at 852-853 (applying former Fifth Circuit's holding in *Twentieth Century Music* to Communications Act of 1934); contrast *Storer Cable Comm. v. Joe's Place Bar & Restaurant*, 819 F. Supp. 593 (W.D. Ky. 1993) (finding no right to jury trial in action seeking statutory damages under Communications Act of 1934 and Public Telecommunications Act of 1988) with *General Instrument Corp. v. Nu-Tek Electronics & Mfg., Inc.*, 1996 WL 184794 (E.D. Pa. Apr. 12, 1996) (finding right to jury trial in action seeking statutory damages under same provisions).

This case is also an ideal vehicle for resolving the persistent conflict. The jury trial issue was squarely raised and decided both in the District Court and the Court of Appeals, and the holdings of those courts resulted in a staggering award of \$8,800,000 in statutory damages—the second highest reported award of statutory damages under the Copyright Act.¹² Had petitioner been granted the jury trial he sought, a jury of his peers—not a judge—would have determined such critical factual issues as willfulness, innocent infringement, whether each of petitioner's stations was a separate infringer, and whether each of the episodes broadcast by petitioner's stations constituted a single work or instead each series constituted a collective work under Section 504(c) for which a single award of damages would have been appropriate.¹³

¹² The largest reported amount is a \$9,000,000 verdict against petitioner—also rendered after a bench trial—arising out of a related licensing dispute. See *MCA Television, Ltd. v. Feltner*, 89 F.3d 766 (11th Cir. 1996), cert. denied, 117 S. Ct. 1248 (1997). Petitioner believes that the third-highest amount is less than \$500,000.

¹³ The Court of Appeals' opinion makes clear that the latter two questions were factual issues for the trier of fact to resolve. The court upheld the district judge's "finding" that identical episodes broadcast by different stations were multiple acts of infringement, holding that petitioner "failed to demonstrate that the finding was

Petitioner presented substantial evidence on these issues, including evidence that he believed in good faith, in light of the ongoing negotiations with Columbia and his extensive experience in the industry, that the licenses had not validly been terminated; that the stations had in fact paid more than \$300,000 to Columbia in fees after Columbia's termination letters were sent; that Columbia suffered no loss from petitioner's actions because Columbia was unable to re-license any of the programs in the same markets; and that the stations earned no profit from the programs and in fact lost money each time the programs were shown.¹⁴

As the Court of Appeals noted on the issue of willfulness, "the facts presented to the district court were susceptible to more than one interpretation." App. 13a. Thus, if a jury had been able to weigh this evidence, the jury might well have found that the infringement was innocent and that Columbia was entitled only to the minimum amount of \$200 per infringement—for a total award of only \$800 if the jury also found that each series was a single work or \$88,000 if the jury found that each episode was a single work and that each station was a separate infringer. This would, of course, be a far cry from the punitive \$8,800,000 award rendered by the district judge, demonstrating the critical importance of safeguarding the constitutional right to a jury trial in this case.

erroneous." App. 15a. Likewise, the Court of Appeals did not dispute petitioner's contention that whether the episodes in each series amounted to a collective work was a factual question, but held that the "evidence support[ed]" the district judge's finding. App. 17a.

¹⁴ Petitioner furthermore proffered expert testimony and licensing agreements demonstrating that the individual episodes of the television series at issue had no separate commercial viability. The District Court refused to consider the proffered evidence. The Court of Appeals, however, did not affirm the exclusion of this evidence, but rather held that even if the ruling were erroneous it was harmless because other evidence supported the District Court's findings. App. 17a.

The extraordinary, nearly unprecedented amount of the damages awarded and the breadth of the factual issues decided by the district judge starkly demonstrate why the Court of Appeals' "seeming curtailment of [petitioner's] right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres*, 359 U.S. at 501 (citation omitted). There is no dispute that the Seventh Amendment guarantees a right to a jury trial on all issues in a copyright infringement action whenever actual damages are sought, and there can now be no serious question that the right extends at least to the issue of infringement even when statutory damages are sought. See *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996) ("[T]here is no dispute that [patent] infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago."); *Cass County*, 88 F.3d at 642 (no material difference between copyright and patent infringement cases).¹⁵

Contrary to the holding of the Court of Appeals, there should likewise be little doubt that this important right extends to all other issues relating to the imposition of statutory damages. In deciding whether the Seventh Amendment guarantees a jury trial on specific issues arising under a statutory cause of action, this Court has emphasized the importance—and possibly dispositive nature—of 18th century English practice, especially where the specific cause of action in question existed at that time. See *Markman*, 116 S. Ct. at 1389 (in some instances, Seventh Amendment determination is "easy because of clear historical evidence

¹⁵ Although the decisions in *Chappell* and *Twentieth Century Music* appear to hold that the issue of infringement is for the judge when statutory damages are sought, such holdings are highly dubious after this Court's recent decision in *Markman*. The more serious conflict involves whether there is a right to have a jury decide the issues relating specifically to the imposition of statutory damages under Section 504(c). The Court of Appeals' denial of a jury trial on any of these issues is in direct conflict with the decisions of the Fourth, Seventh and Eighth Circuits, and it is therefore irrelevant that Columbia was awarded summary judgment below on the issue of infringement.

that the very subsidiary question was so regarded under the English practice of leaving the issue for a jury").

The right to have a jury decide all questions relating to the imposition of statutory damages for copyright infringement is as old as copyright itself. Statutory damages have existed ever since the first copyright statute was enacted in England in 1710, and the damages under that statute (a penny per sheet) were awarded through a common law action. See *Millar v. Taylor*, 98 Eng. Rep. 201, 243 (K.B. 1769) (Yates, J.), *overruled on other grounds*, *Donaldson v. Becket*, 98 Eng. Rep. 257 (1774); Patry, *supra*, at 145-148. When Congress enacted this country's first copyright law in 1790, it continued the English practice of having juries decide actions for statutory damages through common law actions for debt. See Act of May 31, 1790, § 2, 7 Stat. 124 (establishing statutory damages of fifty cents per sheet enforceable "by action of debt"); Patry, *supra*, at 154-173. Thus, it is not surprising that every circuit court to have actually analyzed the issue in detail—the Fourth, the Seventh, and the Eighth—has concluded that this right exists today under the similar statutory damages provisions of Section 504(c).¹⁶

The other factors relied on by this Court—the nature of the remedy and the practical abilities of juries—likewise support a right to a jury trial here. Money damages are the prototypical legal remedy, and courts will find an "exception to the general rule" that such damages must be assessed by a jury only if the damages have the "attributes" of an equitable remedy, "such as in 'action[s] for disgorgement of improper profits,'" or "a monetary award 'incidental to or intertwined with injunctive relief.'" *Terry*, 494 U.S. at 570, 571 (quoting *Tull*, 481 U.S. at 424). The statutory damages awarded in this case bear no resemblance to these equitable remedies. The award of \$8,800,000 has no relation whatsoever to any purported profits earned by Feltner—indeed, the evidence showed there

¹⁶ As one commentator recognized prior to the Ninth Circuit's cursory decision in this case, "none of the Courts of Appeals that held statutory copyright relief to be equitable devoted any appreciable analysis to the question." Stumpff, *supra*, at 1952 n.23.

were none at all—and such an enormous award certainly cannot be characterized as merely “incidental” to injunctive relief. *See Cass County*, 88 F.3d at 643 (“a prayer for damages in the amount of \$5000 per infringement—\$20,000, a substantial amount—indicates to us that the [plaintiffs] did not seek these statutory damages as ‘incidental’ to any other relief”). Rather, the huge sum awarded by the district judge (without any explanation of the reasons for the amount chosen) demonstrates that “another role has emerged for statutory damages in copyright infringement cases: that of a punitive sanction on infringers, and the award of punitive damages traditionally is a jury matter.” *Id.* (punitive nature of award was shown by facts that plaintiffs “had very little actual damage” and defendant “reaped few profits from the infringements”). Finally, no court—even those finding no right to a jury trial—has held that assessing statutory damages is beyond the competence of juries.

Accordingly, in light of the longstanding conflict among the circuit courts, the importance and recurring nature of the constitutional issue presented, and the potentially enormous consequence of the issue to this case, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLUMBIA PICTURES TELEVISION,
Plaintiff-Appellee,

v.

KRYPTON BROADCASTING OF
BIRMINGHAM, INC.; WABM
BIRMINGHAM; KRYPTON
BROADCASTING, INC.; KRYPTON
INTERNATIONAL CORPORATION; WTWV,
INC.; WTVX; DANIEL S. DAYTON;
ALFRED F. DECUR,

Defendants,

and

C. ELVIN FELTNER, JR.,
Defendant-Appellant.

Nos. 94-55816
94-55894

D.C. No.
CV-91-06847-ER

OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
November 15, 1995—Pasadena, California

Filed February 6, 1997

Before: Jerome Farris, Melvin Brunetti, and Alex Kozinski,
Circuit Judges.

Opinion by Judge Brunetti

OPINION

BRUNETTI, Circuit Judge:

C. Elvin Feltner is the owner of Krypton International Corporation, which in turn owns three television stations in the southeast.¹ Columbia Pictures Television licensed several television shows to the three stations, including "Who's the Boss?", "Silver Spoons," "Hart to Hart," and "T.J. Hooker." After the stations became delinquent in paying royalties, Columbia attempted to terminate the licensing agreements. The stations continued to broadcast the programs, and Columbia filed suit. During the course of the litigation, Columbia dropped all causes of action except its copyright claims against Feltner. The district court found Feltner vicariously and contributorily liable for copyright infringement on the part of the Krypton defendants, granted summary judgment in favor of Columbia on liability, and after a bench trial, awarded Columbia \$8,800,000 in statutory damages and over \$750,000 in attorneys fees and costs. In this appeal, Feltner and Krypton International² challenge several of the district court's rulings.

I. SUBJECT MATTER JURISDICTION

Feltner argues that Columbia's complaint fails to properly plead a claim arising under federal copyright law. Therefore, argues Feltner, subject matter jurisdiction was lacking in the district court. However, because Columbia's complaint alleges ownership and infringement of multiple copyrights and seeks relief under several sections of the Copyright Act—17 U.S.C. §§ 502 (injunction), 503 (impoundment),

¹ Krypton International and its subsidiaries—Krypton Broadcasting, Inc.; Krypton Broadcasting of Birmingham, Inc.; Krypton Broadcasting of Jacksonville, Inc.; and Krypton Broadcasting of Ft. Pierce, Inc.—are collectively referred to as "the Krypton Defendants."

² Krypton International is only appealing the district court's dismissal of its counterclaims and the district court's denial of its motion for fees.

504 (damages and profits), and 505 (costs and attorneys fees)—Columbia properly pled a claim arising under federal copyright law. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 584 (9th Cir. 1993); *Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380, 1381-82 (9th Cir. 1988); *Effects Assocs., Inc. v. Cohen*, 817 F.2d 72, 73-74 (9th Cir. 1987). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a).

II. VENUE

Feltner argues that venue was improper in the Central District of California. So long as the underlying facts are not in dispute, we review the district court's venue determination de novo. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 841 (9th Cir. 1986). The district court's factual findings must be accepted unless clearly erroneous. *See Reebok Int'l, Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir.), cert. denied, 116 S.Ct. 276 (1995). We find that venue was proper in the Central District.

Venue under 28 U.S.C. § 1400(a)³ is proper in any judicial district in which the defendant would be amenable to personal jurisdiction if the district were a separate state. *Milwaukee Concrete Studios v. Fjeld Manufacturing Co.*, 8 F.3d 441, 445-47 (7th Cir. 1993); *Johannsen v. Brown*, 788 F.Supp. 465, 469 (D.Or. 1992).

[1] Columbia contends that specific jurisdiction exists over Feltner. We use a three part test for analyzing whether the exercise of specific jurisdiction satisfies the requirements of due process:

- (1) the defendant must purposefully avail himself of the privilege of conducting activities in the forum,

³ 28 U.S.C. § 1400 provides:

Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works may be instituted in the district in which the defendant or his agent resides or may be found.

thereby invoking the benefits and protections of its laws;

- (2) the claim must arise out of or result from the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must be reasonable.

Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990).

[2] Columbia alleged, and the district court found, that Feltner willfully infringed copyrights owned by Columbia, which, as Feltner knew, had its principal place of business in the Central District. This fact alone is sufficient to satisfy the "purposeful availment" requirement. *Calder v. Jones*, 465 U.S. 873, 789-90 (1984) (holding that an intentional tort knowingly directed at a forum resident satisfies the minimum contacts test).

[3] Additionally, Columbia relies on Feltner's wide-ranging contract-related contacts with Columbia in the Central District. Feltner argues that these contacts cannot support venue because they all arise out of the license agreements which, according to Feltner, are unenforceable because they were never signed by Columbia. This argument fails both because Feltner did not raise this argument in the district court and because whether or not the agreements are enforceable as a matter of contract law, Feltner's contacts with the Central District remain the same. Feltner's contract-related contacts are sufficient to satisfy the "purposeful availment" requirement. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 479 (1985) (holding in contract action that, when one analyzes the "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing," the purposeful availment requirement is satisfied if a defendant has created "continuing obligations between himself and residents of the forum").

[4] Under the second prong, Columbia's claims clearly "arise out of or result from the defendant's forum-related activities." As correctly asserted by Columbia, Feltner was

able to authorize infringing broadcasts of Columbia's programs only because Columbia shipped those programs from the Central District to the Krypton stations pursuant to the license agreements.

[5] Finally, under the third prong, "there is a *presumption of reasonableness* upon a showing that the defendant purposefully directed his actions at forum residents which the defendant bears the burden of overcoming by presenting a compelling case that jurisdiction would be unreasonable." *Haisten v. Grass Valley Medical Reimbursement*, 784 F.2d 1392, 1397 (9th Cir. 1986) (citing *Burger King*, 471 U.S. at 477) (emphasis in original). Feltner's contentions—that he had more of a burden litigating in California than Columbia would have had in Florida, that Florida had a stronger interest than California in adjudicating the suit because he lived in Florida, and that Florida was the most efficient forum—are insufficient to meet his burden.

Because Feltner would be amenable to personal jurisdiction in the Central District if the Central District were a separate state, venue was proper under 28 U.S.C. § 1400(a).⁴

III. SUMMARY JUDGMENT

Feltner contends that summary judgment was inappropriately granted because: (A) Columbia was not the proper party to the copyright claims; (B) there was a triable issue of fact as to whether Columbia's termination of the license agreements was proper; (C) there was a triable issue of fact as to whether Feltner would reasonably have interpreted Columbia's actions as terminating the license agreements; and (D) triable issues of fact existed concerning Feltner's allegations that Columbia was precluded from terminating the agreements on the basis of estoppel, negligent

⁴ The district court also relied on the license agreements' forum selection clauses to confer venue. While we agree with the district court that the forum selection clauses were appropriately enforced against Feltner, we need not analyze the issue here.

misrepresentation, and an oral contract not to terminate. None of Feltner's contentions has merit.

A. Feltner's Standing Argument Is Not Properly Before This Court.

Feltner argues that the district court's summary judgment ruling was erroneous because, under 17 U.S.C. § 501(b), Columbia was not the proper party to the copyright claims. Feltner never raised this argument in his opposition to Columbia's summary judgment motion. In fact, in his "Statement of Genuine Issues," Feltner agreed that "Columbia holds the copyright to each . . . episode" at issue. While Feltner now contends that the issue was "raised in a Motion to Vacate filed under F.R.Civ.P. 60(b)," this contention is not supported by the record: The district court denied Feltner's motion for leave to file the motion to vacate, impliedly finding that Feltner had failed to meet the prerequisites for relief under F.R.Civ.P. 60(b) and Central District Local Rule 7.16.

A district court's decision not to consider an argument raised for the first time on reconsideration is reviewed for abuse of discretion, *Rosenfeld v. United States Dept. of Justice*, 57 F.3d 803, 811 (9th Cir. 1995). Because Feltner has failed to demonstrate that the district court abused its discretion in refusing to consider his motion to vacate, Feltner's standing argument may not be considered on appeal.

B. Columbia's Termination Was Proper.

Feltner argues that a triable issue of fact exists as to whether the defendants' breach of the license agreements was sufficiently material to enable Columbia to terminate the agreements. In support of his argument, Feltner cites *Rano v. Sipa Press, Inc.*, 987 F.2d at 586-87, and *Fantasy, Inc. v. Fogarty*, 984 F.2d 1524, 1529-31 (9th Cir. 1993), *rev'd on other grounds*, 114 S.Ct. 1023 (1994), which held that the licensing agreement at issue was not rightfully terminated because the licensee's breach did not "go to the root of the matter," *Fantasy*, 984 F.2d at 1530 (citations omitted), or did not "constitute a total failure in the performance of the

contract." *Rano*, 987 F.2d at 586 (citation and internal quotation omitted).

[6] However, both *Rano* and *Fantasy* dealt with licensing agreements that did not have an express contractual provision authorizing termination. See *Rano*, 987 F.2d at 583; *Fantasy*, 984 F.2d at 1529. In contrast, each of the license agreements in this case has an express provision authorizing Columbia to terminate the agreement if the licensee "fails to make payments of the License Fee or any portion thereof when due." Because these agreements expressly consider the failure to timely pay royalties material, Columbia's termination of the agreements was proper. See *Fantasy*, 984 F.2d at 1529 (stating that "a bona fide dispute concerning royalty payments does not automatically constitute a material breach *unless the contract so provides*") (emphasis added and omitted).

C. Feltner Could Not Reasonably Interpret Columbia's Actions As Anything But Termination.

Feltner's version of the facts surrounding the termination of the licensing agreements is as follows: In 1989, Feltner began negotiations to purchase WNFT-TV in Jacksonville, Florida. Because he determined that the station needed to cut expenses to operate profitably, he instructed Dan Dayton, his Chief Operating Officer, to negotiate with all of the syndicators supplying programs to WNFT to see if they would be willing to restructure the license agreements. In this regard, Dayton contacted John Darakjy of Columbia, who indicated that Columbia would "work with" Krypton to restructure the deal. Dayton memorialized this conversation in a March 22, 1990 letter.

Feltner thereafter purchased WNFT, as well as stations WABM-TV in Birmingham, Alabama and WTVX-TV in West Palm Beach, Florida. From March 1990 until Columbia filed its lawsuit in December of 1991, Columbia and the Krypton entities engaged in protracted negotiations for the restructure of each of the three stations' debt to Columbia. During that time, at least thirteen written proposals of restructure were exchanged—six from Columbia

and seven from Krypton. The parties were unable to reach an agreement "primarily because Columbia insisted upon a large up-front payment and refused to spread out the payments over the entire term of the contract notwithstanding defendants' protests that the stations were not earning enough money to make those payments."

On July 8, 1991, Columbia sent the first of three purported termination letters.⁵ Despite the letter's threatening language, Columbia made no attempts to enforce the letter's demands and sent three more restructure proposals in September and October of 1991. On October 17, 1991, Columbia sent another termination letter similar to the letter of July 8. Like the July 8 letter, the October 17 letter was subsequently contradicted by a restructure proposal sent on December 10, 1991.

Based on these facts, Feltner argues that a triable issue of fact exists as to whether he should have reasonably interpreted Columbia's conduct to effectuate a termination of the licensing agreements. In particular, Feltner cites to the ambiguity caused by the restructuring proposals sent by Columbia after the purported termination letters of July 8 and October 17 and the inconsistency of the July 8 and October 17 letters' simultaneous demands of full accelerated payment and termination of the license agreements.

[7] Feltner's arguments are unavailing. Both the July 8 and October 17 letters are clear and unequivocal. While Feltner argues that the October 17 letter was rendered ambiguous by the letter of December 10, the December 10 letter clearly indicates that it was sent "in the interest of resolving Columbia's claims without resorting to litigation," and that if Krypton "continu[ed] its deliberate campaign of copyright infringement," Columbia would file a lawsuit. Nor could the other restructure proposals be interpreted as anything other than last-ditch efforts to strike a deal.

⁵ The letter demanded that WNFT cease and desist from the broadcast of the formerly-licensed programs and demanded the immediate accelerated payment of \$2,733,644.18.

[8] Likewise, the October 17 letter was not rendered ambiguous by the simultaneous exercise of the acceleration and termination provisions. The contract clearly indicates that in the event of a failure to pay royalties, Columbia could terminate the agreement *and* would be immediately entitled to "the entire unpaid balance of the license fee." Thus, the October 17 letter's exercise of both the acceleration provision and termination provision could not reasonably be interpreted as ambiguous.

D. Feltner's Defenses Fail as a Matter Of Law.

In his reply brief to this court, Feltner argues that, despite the apparent termination, there was nevertheless a triable issue of material fact concerning whether Columbia was precluded from terminating on the basis of estoppel, negligent misrepresentation, or an oral contract not to terminate. Feltner's evidence fails to raise a triable issue of fact as to any of these defenses.

[9] A claim of promissory estoppel requires, among other things, "a promise clear and unambiguous in its terms," and injury caused by the promisee's reasonable reliance on the promise. *Laks v. Coast Federal Sav. & Loan Ass'n*, 131 Cal.Rptr. 836, 839 (Ct. App. 1976). The only "promise" that could reasonably be inferred from Feltner's evidence was a promise by Columbia to "work with" Krypton. However, this is not a "clear and unambiguous" promise, for it clearly contemplated further negotiations to finalize the terms of the restructure. *Id.* Furthermore, to the extent it was an adequate promise, Feltner was not injured because Columbia performed the promise by negotiating extensively from March 1990 until December 1991. Thus, Feltner's promissory estoppel claim must fail.

Feltner's negligent misrepresentation claim is similarly defective. Negligent misrepresentation is "a statement made for the guidance of others which is not warranted by the information of the person making it." *Grenell v. City of Hermosa Beach*, 163 Cal.Rptr. 315, 319 (Ct. App. 1980); see Cal. Civ. Code § 1527(2). Although Feltner argued in the

district court that Columbia had already restructured the license agreement with Krypton's predecessor and that Columbia's practice was not to undertake subsequent restructures of licenses that had already been restructured, Feltner has failed to present sufficient evidence for a reasonable jury to conclude that this was in fact Columbia's practice. Thus, Feltner has failed to raise a triable issue of fact on his negligent misrepresentation claim.

[10] Lastly, Feltner's breach of oral contract claim is properly dismissed on summary judgment. "An agreement to make in the future such a contract as may be agreed upon at a later time amounts to nothing, is not binding, and cannot be made the basis of a cause of action." *Forgeron Inc. v. Hansen*, 308 P.2d 406, 411 (Cal. Ct. App. 1957) (quoting 12 Cal.Jr.2d. Contracts, § 111); accord *Kruse v. Bank of America*, 248 Cal.Rptr. 217, 229 (Ct. App. 1988), cert. denied, 488 U.S. 1043 (1989). Because the facts presented by Feltner indicate, at best, an agreement to negotiate in the future, Feltner has failed to raise a triable issue of act on his oral contract claim.⁶

In sum, Feltner failed to raise a triable issue of material fact as to whether Columbia validly terminated the license agreements by October 17, 1991. Summary judgment against Feltner for copyright infringements occurring after that date was therefore proper.

IV. COURT TRIAL ON STATUTORY DAMAGES

[11] Section 504(c)(1) of the Act allows a copyright holder to elect statutory damages in lieu of actual damages. If statutory damages have been elected, and a defendant is found to have infringed, damages are to be awarded "in a

⁶ While Feltner raises the claims of promissory estoppel, negligent misrepresentation, and breach of oral contract as defenses to Columbia's copyright claim, the Krypton defendants argued these theories as part of a counterclaim filed against Columbia. As the above discussion makes clear, the district court properly granted summary judgment in favor of Columbia on the Krypton defendants' counterclaims.

sum of not less than \$500 or more than \$20,000 as the court considers just." 17 U.S.C. § 504(c)(1). Additionally, if the "court finds . . . that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$100,000," and if the court finds that the infringement was committed innocently "the court [in] its discretion may reduce the award of statutory damages to a sum of not less than \$200." *Id.* § 504(c)(2). Columbia elected statutory damages. Over Feltner's objection, the district court held a bench trial on damages, found Feltner's infringement to be willful, and fixed the statutory damages at \$20,000 per violation.

Feltner argues that the district court's denial of his request for a jury trial on the issue of statutory damages was erroneous, both as a matter of statutory interpretation and because it deprived him of his Seventh Amendment right to a jury trial. We reject Feltner's argument.

[12] In *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), we interpreted the analogous statutory damages provision of the 1909 Copyright Act and held that the amount of statutory damages "is properly addressed to the court, not the jury." *Id.* at 1177. In so holding, the court relied on the statute's language, which provided for the award of "such damages as to the court shall appear to be just." *Id.* at 1177 n. 5 (quoting 17 U.S.C. § 101(b)) (emphasis added). The *Krofft* court reasoned: "The jury plays no role in this determination, because 'the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like, is made the measure of the damages to be paid. . . .'" *Id.* at 1177 (quoting *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919)) (emphasis in original).

Feltner argues that *Krofft* is distinguishable because the 1909 Act, interpreted by *Krofft*, gave the court the option of awarding "in lieu" (statutory) damages while the 1976 Act gives the option to elect statutory damages to the plaintiff. However, *Krofft's* rationale is equally applicable to § 504 of

the 1976 Act. Section 504(c)(1) of the 1976 Act, like § 101(b) of the 1909 Act, provides for the award of such damages (within fixed limits) "as the court considers just." 17 U.S.C. § 504(c)(1). If Congress intended to overrule *Krofft* by having the jury determine the proper award of statutory damages, it would have altered this language.

[13] As for Feltner's contention that the district court's ruling deprived him of his Seventh Amendment right to a jury trial, we agree with those cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature. See *Cable/Home Communication v. Network Prods., Inc.*, 902 F.2d 829, 852-53 (11th Cir. 1990); *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. 1981); *Raydiola Music v. Revelation Rob, Inc.*, 729 F.Supp. 369 (D.Del. 1990); cf. *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014-16 (7th Cir.), cert. denied, 502 U.S. 861 (1991) (holding that the amount of statutory damages is decided by the court but the issue of willfulness should be tried to the jury). But see *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996) (holding that Seventh Amendment provides right to have jury assess statutory damages); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119-21 (4th Cir. 1981) (same); *Educational Testing Services v. Katzman*, 670 F.Supp. 1237 (D.N.J. 1987) (same). See generally 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 14.04[C] (1995) (listing cases and describing those cases allocating decision to judge as "the better view").

The district court properly denied Feltner's request for a jury trial on the issue of statutory damages.

V. WILLFULNESS FINDING

[14] "Willful" within the meaning of § 504(c)(2) means "with knowledge that the defendant's conduct constitutes copyright infringement." *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990) (quoting 3 *Nimmer on Copyright* § 1404[B], at 14-40.2-.3 (1989)), cert.

denied, 498 U.S. 1109 (1991). "To refute evidence of willful infringement, [the defendant] must not only establish its good faith belief in the innocence of its conduct, it must also show that it was reasonable in holding such a belief." *Id.* at 1336.

[15] Feltner contends that the district court's findings of willfulness are unsupported by the evidence. In support of this contention, Feltner presents his version of how the evidence should be interpreted. Feltner, however, neglects to mention that the district court's finding is reviewed for clear error. See Fed.R.Civ.P. 52(a); *Price v. United States Navy*, 39 F.3d 1011, 1021 (9th Cir. 1994). Feltner's arguments, at best, demonstrate that the facts presented to the district court were susceptible to more than one interpretation. Considering that all 440 of the infringing episodes were broadcast after Columbia's clear termination of the licensing agreements on October 17, 1991, and 415 of them were broadcast after the complaint in this action was filed, we cannot say that the district court's finding was clearly erroneous.

VI. EVIDENTIARY RULINGS REGARDING FELTNER'S RELATIONSHIP TO COUNSEL

[16] Prior to trial, the district court granted Columbia's motion in limine to preclude Feltner from introducing evidence relating to advice of counsel because Feltner refused to answer questions on the issue during his deposition. Feltner now argues that the in limine order precluded Columbia from questioning Feltner at trial about whether his counsel kept him apprised of the progress of the litigation, and the district court's failure to prevent Columbia from doing so was erroneous. Feltner's argument fails for two reasons. First, because he objected to Columbia's questions at trial only on relevance and that on calling for a legal conclusion, he waived the objection he now raises. Furthermore, even if the objection was not waived, the testimony admitted was not precluded by the in limine order because the testimony concerned Feltner's knowledge of the litigation, not whether he relied on the advice of counsel.

VII. CALCULATION OF THE NUMBER OF INFRINGEMENTS

A. The Stations Were Separate Infringers.

[17] Section 504(c)(1) of the Act provides that statutory damages may be awarded “for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally” Thus, when statutory damages are assessed against one defendant or a group of defendants held to be jointly and severally liable, each work infringed may form the basis of only one award, regardless of the number of separate infringements of that work. See *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 143-44 (5th Cir. 1992). However, “where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate.” H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 162, reprinted in 1976 U.S. Code Cong. and Admin. News 5778; *Mason*, 967 F.2d at 144.

[18] By finding that “the ‘Who’s the Boss?’ episodes broadcast by WNFT are separate acts of infringement from the episodes broadcast by WTVX,” the district court impliedly found that WNFT and WTVX were not joint tortfeasors with respect to the broadcasting of these episodes. Feltner, relying on *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 778-778 (8th Cir. 1988), argues that this finding was erroneous because Columbia had repeatedly alleged in its complaint that all of the defendants acted together and should be treated as one. See ER Tab 1, First Amended Complaint, ¶¶ 18, 19, 31-114.

[19] *RCA/Ariola* is distinguishable. In that case, the district court had found a group of defendants to be jointly and severally liable. *Id.* at 778. On appeal, the Eighth Circuit rejected the plaintiff’s argument that the district court’s finding was erroneous. Because the plaintiff asserted in its summary judgment papers that the defendants were jointly and severally liable, the plaintiff “invited any error and ha[d] no

grounds to complain.” *Id.* at 779. In contrast to *RCA/Ariola*, the district court’s finding was *contrary* to the allegations in the complaint and it is the defendant who is challenging the findings. Feltner has not presented sufficient facts to develop a “judicial estoppel” argument. See *Rockwell International v. Hanford Atomic Metal Trades*, 851 F.2d 1208, 1210 (9th Cir. 1988) (defining purpose of judicial estoppel as “preventing the use of inconsistent assertions that would result in an ‘affront to judicial dignity’ and ‘a means of obtaining unfair advantage’”) (citations omitted). Thus, despite the fact that the district court’s finding on this issue was both favorable to the plaintiff and contrary to the complaint, Feltner has failed to demonstrate that the finding was erroneous.⁷

B. Each Episode Was a Separate Work.

As mentioned, § 504(c)(1) of the Act provides that statutory damages may be awarded “for all infringements involved in the action, with respect to any one work.” Section 504(c)(1) further provides that “for purposes of this subsection, all the parts of a compilation or derivative work constitute one work.” The district court found that each infringed episode of the television series constituted a separate work for purposes of § 504(c)(1). Feltner argues that each series, and not each episode, constitutes a work.

[20] The two courts to have addressed whether each episode of a television series constitutes a separate work have both held in the affirmative. *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st Cir. 1993); *Twin Peaks Prods. v. Publications Int’l*, 996 F.2d 1366, 1380-81 (2d Cir. 1993).⁸ Feltner attempts to distinguish these cases

⁷ Feltner’s other argument on this issue—that the finding was erroneous because Feltner was jointly and severally liable with all three stations—is similarly meritless. Because the stations were not jointly and severally liable with each other, Feltner’s liability vis-a-vis the stations merely renders him jointly and severally liable for each station’s infringements—it does not convert the stations’ separate infringements into one.

⁸ We note that the Eleventh Circuit, in another case in which Feltner was the defendant, recently agreed that each episode of a

by arguing that the episodes at issue are not separate works because they do not have independent economic value.

While Feltner correctly states the proper test to apply in analyzing whether each episode is a separate work, see *Gamma Audio*, 11 F.3d at 1117 (focusing on whether each television episode “has an independent economic value and is, in itself, viable”); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C.Cir. 1990) (stating that “separate copyrights are not distinct unless they can ‘live their own copyright life’”) (quoting *Robert Stigwood Group Ltd. v. O’Reilly*, 530 F.2d 1096, 1105 (2d Cir.), cert. denied, 429 U.S. 848 (1976)), the facts upon which Feltner bases his argument—that the episodes are licensed as a series—were addressed and rejected in *Gamma Audio*.

In *Gamma Audio*, the district court found that the episodes were a single work because the copyright holder sold only complete sets of the series to video stores. 11 F.2d at 1117. The First Circuit found this unpersuasive. Instead, the court found significant “the fact that (1) viewers who rent the tapes from their local video stores may rent as few or as many tapes as they want, may view one, two, or twenty episodes in a single setting, and may never watch or rent all of the episodes; and (2) each episode in the ... series was separately produced.” *Id.*

[21] In this case, the different episodes were broadcast over the course of weeks, months, and years. From this fact, it was reasonable for the district court to conclude that, as in *Gamma Audio*, viewers may watch as few or as many episodes as they want, and may never watch all of the episodes. Additionally, it was clear from the record that the episodes could be repeated and broadcast in different orders. Nor does Feltner contest that the episodes were separately written, produced, and registered. Thus, this case comes squarely within the holdings of *Gamma Audio* and *Twin Peaks*.

television series was a separate work. *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 1996 WL 388406 at *2-3 (11th Cir. Jul. 26, 1996).

Feltner also contends that each series was an anthology, a type of “compilation” under § 504(c). See § 101 (defining “compilation” as including “collective works”); *id.* (defining “collective work” as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole”). Feltner argues that the question of whether the episodes amounted to a “collective whole” was a factual one. Thus, argues Feltner, the district court’s refusal to allow Feltner to produce evidence on the issue, which would have consisted of a license agreement and expert testimony that “programs of this nature are considered to be anthologies,” was error.

[22] Even were Feltner allowed to prove that the programs were considered to be “anthologies,” he would still have to show that they consisted of “separate and independent works ... assembled into a collective whole.” As mentioned, the evidence was uncontroverted that the episodes were broadcast over the course of weeks, months, or even years, and could be repeated and rearranged at the option of the broadcaster. Because this evidence supports the conclusion that the episodes were not “assembled into a collective whole,” it was not error for the district court to reject Feltner’s contention that each series was a “compilation” under § 504(c).

The district court did not err in calculating the number of infringements.

VIII. AMOUNT OF STATUTORY DAMAGES AWARDED

[23] “[T]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.” *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). “Within these limits the court’s discretion and sense of justice are controlling.” *Peer International*, 909 F.3d at 1336 (quoting *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952)). Feltner argues that the court’s award was erroneous because it failed to take into account

certain factors and because it failed to articulate its reasons for the award. However, considering the numerous willful infringements involved, for which the maximum award is \$100,000 per work infringed, the district court's award of \$20,000 per work infringed is well within the statutory limits and is not an abuse of discretion.

IX. COLUMBIA'S FEES

[24] "The decision to award fees, and the amount of fees awarded, are both reviewed for abuse of discretion." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1556 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990). While a plaintiff in a copyright action is generally awarded fees by virtue of prevailing in the action, the plaintiff still bears the burden of showing the time spent and hourly rate to be reasonable. *Id.* at 1556-57. Feltner challenges the district court's fee award on three grounds: (1) Feltner was not given enough time to oppose it; (2) "there was no effort to delete items related to unrelated matters"; and (3) the district court granted Columbia all of the fees requested without providing any discussion or explanation.

Feltner's first two challenges miss the mark. As to the first, Feltner has not demonstrated that the district court's refusal to grant a two-week continuance was an abuse of discretion. The district court did grant a one-week continuance, giving Feltner two weeks to prepare an opposition. As to the second, Feltner has not cited any specifics in support of his contention that some entries were not "reasonably necessary to the successful prosecution of [Columbia's] copyright claims," *Frank Music*, 886 F.2d at 1557, and has therefore failed to show that the district court's refusal to delete any entries was an abuse of discretion.

[25] Feltner's third challenge, however, has merit. This Circuit has a "long-standing insistence upon a proper explanation of any fee award" by a district court. *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 623 (9th Cir. 1993); *see also Frank Music*, 886 F.2d at 1557 ("In setting a reasonable attorneys fee, the district court should make specific findings

of the rate and hours it has determined to be reasonable."); *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984) ("The district court appears to have accepted uncritical plaintiff's representations concerning the time expended on this case, and it awarded the entire amount requested by plaintiff. Such a procedure is inadequate."). The district court, rather than providing a reasoned explanation of its fee award, simply included the entire amount requested in the final judgment. Thus, without expressing any opinion on whether or not the fees claimed were reasonable, we must vacate the district court's fee award and remand the matter so that the district court may provide a reasoned explanation supporting the amount of fees awarded.

X. APPELLANT'S FEES

Feltner and Krypton International contend that they were entitled to attorneys' fees as prevailing parties under the license agreements. Additionally, Krypton International asserts that it was entitled to attorneys fees under 17 U.S.C. § 505 because it prevailed on Columbia's copyright claims.

[26] As to their claim for fees under the license agreement, California law governs. *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985). Under California law, a defendant in a contract action is not a prevailing party when the plaintiff voluntarily dismisses the action. Cal. Civ. Code § 1717(b)(2). This is so regardless of whether the dismissal is with or without prejudice. *D & J, Inc. v. Ferro Corp.*, 222 Cal.Rptr. 656, 657 (Ct. App. 1986). Thus Appellants were not prevailing parties under the license agreement.⁹

As to Krypton International's claim for fees pursuant to 17 U.S.C. § 505, it has failed to show that the district court's denial of its fee request was an abuse of discretion. *See, e.g.,*

⁹ In reply, Appellants argue that they should have been awarded fees under Rule 11. However, because Appellants never brought a Rule 11 motion in the district court, this argument is without merit. *See Fed.R.Civ.P. 11(c)(1)(A)* ("A motion for sanctions under this rule shall be made separately from other motions or requests. . . .").

National Conference of Bar Examiners v. Multistate Legal Studies, Inc., 692 F.2d 478, 488 & n.12 (7th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

CONCLUSION

Except for the district court's award of attorneys' fees to Columbia, we affirm the decision of the district court in all respects. We vacate the fee award and remand the matter on a limited basis so that the district court may provide a reasoned explanation of the amount of fees awarded. We retain jurisdiction over this appeal during the pendency of the limited remand, and the district court shall forward a copy of its order awarding fees within sixty days of the issuance of this remand.

APPENDIX B

[FILED Apr. 4, 1994]

[ENTERED Apr. 3, 1994]

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES	) No. CV. 91-6847 ER (CTX)
TELEVISION, INC.,)
)
Plaintiff,	) ORDER FOR JUDGMENT
)
v.)
)
KRYPTON BROADCASTING)
OF BIRMINGHAM, INC., et al.,)
)
Defendant.)

On March 12, 1994, this matter came before the United States District Court for the Central District of California, the Honorable Edward Rafeedie, presiding, for a bench trial on the amount of statutory damages under the Copyright Act to be assessed against defendant C. Elvin Feltner Jr. (Feltner). The Court having previously granted partial summary judgment in favor of plaintiff Columbia Pictures (Columbia) on the issue of liability for contributory and vicarious copyright infringement against defendant Feltner, plaintiff's claim against Defendant Krypton International Corporation having been dismissed.

WHEREFORE, after considering the evidence presented in Court, arguments of counsel and all other matters presented to the Court, the Court concludes as follows:

1. A total of Four Hundred and Forty (440) episodes of Columbia's television programs were broadcast by the defendant after the termination of the licensing agreements.

The Court concludes that each episode constitutes a separate work for purposes of computing statutory copyright damages. Twin Peaks Prods. v. Publications, Int'l, Ltd. 996 F. 2d 1366 (2d Cir. 1993). Furthermore, the Court finds that the "Who's the Boss?" episodes broadcast by WNFT are separate acts of infringement from the episodes broadcast by WTVX. Therefore, there were Four Hundred and Forty (440) separate infringements for which defendant Feltner was liable.

2. Under the Copyright Act, 17 U.S.C. § 504(c), the range for each statutory damage award is from a minimum of \$500 to a maximum of \$20,000 per work infringed. The minimum is lowered to \$200 per work for innocent infringement, and the maximum is raised to \$100,000 for willful infringement.

3. In this matter, the Court finds that defendant Feltner's infringement was willful. On previous motion for partial summary judgment, the Court found that Columbia's termination of the licensing agreements on October 17, 1991 was clear and unequivocal. This alone should have put the defendant on notice that his continued broadcast of the Columbia programs was without license, and therefore infringing.

The evidence demonstrates that Feltner was repeatedly warned by both Columbia and people within the Krypton entities that continued broadcasts were unauthorized and infringing. Moreover, the evidence is clear that over 94% of the episodes infringed (415 of the 440 episodes) were broadcast after the Complaint in this action was filed on December 17, 1991.

Defendant contends that he believed the default letters and even the lawsuit were "tools" Columbia was using to collect the largely unpaid licensing fees defendant owed. The Court finds that it would have been unreasonable to believe this, in light of the clear language of the termination letters and Feltner's extensive experience in the business world. After the October 17, 1991, termination, Columbia stopped

shipping tapes with new programming, and stopped sending monthly bills.

Finally, defendant's failure to send even a small payment on any of the license agreements, when there had at least been token payments before the termination, belies defendant's claim that he thought the termination was a mere billing dispute.

4. With a finding of willfulness, the range of statutory damages to be awarded is from \$500 to \$100,000. In the Ninth Circuit, "[t]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima." Harris v. Emus Records Corp. 734 F.2d 1329, 1335 (9th Cir. 1984).

5. The Court therefore awards plaintiff Twenty Thousand Dollars (\$20,000) for each work infringed, for a total of Eight Million, Eight hundred thousand dollars (\$8,800,000), plus attorneys' fees and costs incurred by Columbia in the prosecution of this action, in an amount to be determined by motion of the plaintiff within 15 days of receipt of this Order.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: April 4, 1994

/s/
Edward Rafeedie

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APPENDIX C

CIVIL DOCKET CONTINUATION SHEET

Date	NR.	Proceedings
11/19/93	BP	228. M.O. Court having read & considered all pleadings submitted & having heard stmt of cnsl, mot pla in limine to exclude consideration of dft's counterclaims & mot to confirm bench trial is granted. Pla's counsel is given permission to fl mot. to dismiss or mot for partial S/J. c/r Mary Tucker

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APPENDIX D

[FILED Sep. 28, 1993]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES	) No. CV. 91-6847-ER
TELEVISION, INC.,)
	) ORDER GRANTING
Plaintiff,	) PLAINTIFF'S MOTION
	) FOR SUMMARY
v.	) ADJUDICATION RE
	) COPYRIGHT LIABILITY
KRYPTON BROADCASTING	) AGAINST DEFENDANT
OF BIRMINGHAM, INC., et al.,	) C. ELVIN FELTNER, JR.
)
Defendant.)

WHEREAS on December 1, 1992, Plaintiff, Columbia Pictures Television, Inc. ("Columbia") moved the Court for Summary Adjudication Re Copyright Liability Against Defendant C. Elvin Feltner, Jr.

WHEREAS oral argument on the aforesaid motion for summary adjudication was held before the Honorable Edward Rafeedie on September 27, 1993, Henry J. Tashman appearing on behalf of Columbia and Daniel Johnson appearing on behalf of Defendant C. Elvin Feltner, Jr.

WHEREFORE, after considering the moving and opposing papers, arguments of counsel and all other matters presented to the Court, and for the reasons stated in open court, IT IS HEREBY ORDERED, as follows:

1. That Plaintiff Columbia Pictures Television, Inc. is entitled to entry of an interlocutory judgment in its favor finding that Defendant C. Elvin Feltner, Jr., is liable, under

the doctrines of vicarious copyright infringement and contributory copyright infringement, for Six Hundred Sixty Four (664) separate infringements of Columbia's copyrighted works "WHO'S THE BOSS?", "SILVER SPOONS", "HART TO HART", "T.J. HOOKER" on the dates set forth in Columbia's [Proposed] Statement of Undisputed Facts. The amount of damages with respect to the aforesaid infringements shall be determined at trial.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: September 28, 1993

/s/
Edward Rafeedie

HENRY J. TASHMAN, ESQ. (Cal. State Bar No. 108695)
CHRISTOPHER PESCE, ESQ. (Cal. State Bar No. 158732)

Of Counsel

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Attorneys for Plaintiff
COLUMBIA PICTURES TELEVISION, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES	) Case No. CV 91-6847 ER (Ctx)
TELEVISION, INC.,)
)
Plaintiff,	) PLAINTIFF'S
	) [PROPOSED] STATE-
v.	) MENT OF UNCON-
	) TROVERTED FACTS
KRYPTON BROADCASTING	) AND CONCLUSIONS
OF BIRMINGHAM, INC.;	) OF LAW RE: LIABILITY
WABM BIRMINGHAM; KRYPTON	) FOR COPYRIGHT
BROADCASTING, INC.;	) INFRINGEMENT
KRYPTON INTERNATIONAL	) AGAINST DEFENDANT
CORP.; WMPT-TV; BONO	) C. ELVIN FELTNER, JR.
EQUITY CORPORATION a/k/a)
NORTH FLORIDA 47, INC.;	) Date: December 28, 1992
KRYPTON BROADCASTING	) Time: 10:00 a.m.
OF JACKSONVILLE, INC., a	) Place: Courtroom of the
Florida Corporation; KRYPTON	) Honorable Edward
BROADCASTING OF JACK-	) Rafeedie
SONVILLE, INC., a Delaware)
Corporation; KRYPTON BROAD-)
CASTING OF FORT PIERCE,)
INC., a Florida corporation;)

KRYPTON BROADCASTING)
 OF FORT PIERCE, INC., a)
 Delaware Corporation; KRYPTON)
 BROADCASTING CORPORA-)
 TION, a Delaware Corporation;)
 WTWV, INC.; WTVX; C. ELVIN)
 FELTNER, JR., DANIEL S. DAY-))
 TON; and ALFRED F. DECUIR,)
)
 Defendants.)
)

After consideration of the papers in support of and in opposition to plaintiff's motion for summary judgment and the oral argument of counsel, the Court determines that the following facts have been established re:

UNCONTROVERTED FACTS

A. Parties

1. Columbia Pictures Television, Inc. ("Columbia"), is a Delaware corporation with its principal place of business in the County of Los Angeles. First Amended Complaint at ¶ 1.

2. Krypton International Corporation is a holding company that owns Krypton Broadcasting Corporation. Krypton Broadcasting owns three television stations: Krypton Broadcasting of Jacksonville, Inc., which operates television station WMPT (hereinafter "WMPT"); Krypton Broadcasting of Birmingham, Inc., which operates television station WABM (hereinafter "WABM"); and Krypton Broadcasting of Fort Pierce, Inc., which operates television station WTVX (hereinafter "WTVX"). Feltner Dep. at 44, and 47-50; Plaintiff's Memorandum at 1-2. Mr. Feltner is the Chairman of the Board of each of these corporations. Feltner Dep. 33, 37, 44-50; Plaintiff's Memorandum at 1-2.

B. Program Licensing Contracts

3. Columbia licensed WABM to broadcast two television series, "HART TO HART" and "T.J. HOOKER," pursuant to two contracts directly between Columbia and Krypton Broadcasting of Birmingham. See Ex. G and H to Eliss Keen Decl.; Plaintiff's Memorandum at 2.

4. Pursuant to two license contracts between Columbia and WTWV, Inc., Columbia licensed WTWV, Inc. to broadcast on television station WTVX, which WTWV, Inc. then owned, "WHO'S THE BOSS?" See Ex. F to Eliss Keen Decl.; Plaintiff's Memorandum at 2. These contracts were assumed by Krypton Broadcasting of Fort Pierce, Inc. See Ex. B to Tashman Decl. at pp. 25-26 and Schedule D thereto; Plaintiff's Memorandum at 2.

5. Columbia licensed WNPT to broadcast "WHO'S THE BOSS?," "SILVER SPOONS," "THE FACTS OF LIFE," "PUNKY BREWSTER," and "T.J. HOOKER," all pursuant to license contracts between Columbia and North Florida 47, Inc., the former station owner. See Ex. A, B, and D to Eliss Keen Decl.; Plaintiff's Memorandum at 2. These contracts were assumed by Krypton Broadcasting of Jacksonville. See Ex. C, to Tashman Decl. at § 2(A)(iv) and (D) and Ex. D and E (the Asset Purchase Agreement); Plaintiff's Memorandum at 2.

6. Each episode of each of these television programs is separately copyrighted, and Columbia holds the copyright to each such episode. Declaration of Gregory K. Boone Decl. at ¶ 3; Plaintiff's Memorandum at 2.

C. Termination of Licensing Contracts

7. On October 17, 1991, Columbia sent a termination letter to Mr. Feltner, advising him that each station was in default for nonpayment of license fees, that such nonpayment constituted an event of default, and that Columbia was exercising its rights of termination and other remedies under the contracts. Exhibit A to Darakjy Decl.; Plaintiff's Memorandum at 2-3.

8. Columbia essentially made three demands in this termination letter: (1) that Mr. Feltner's television stations, WABM, WTVX, and WNFT cease and desist all further broadcast of the Columbia programs; (2) that each station return all video cassette copies of the programs to Columbia, and (3) that each station immediately pay the full amount of the license fees due under the contracts. Exhibit A to Darakjy Decl. at p. 3; Plaintiff's Memorandum at 3. Columbia also expressly warned Mr. Feltner in this letter that any further broadcasts of Columbia programs by his stations would constitute intentional copyright infringement for which Columbia would seek additional remedies. *Id.*

9. The warning to Mr. Feltner was repeated in a letter from Columbia's counsel on November 8, 1991. Ex. G to Tashman Decl.; Plaintiff's Memorandum at 3.

D. Conduct Following Termination of Licensing Contracts

10. On each of October 24, 25, 26, 29, 30, and 31, November 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, and December 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, and 31, 1991, and January 1, 2, 3, 6, 7, 8, 9, 10, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, and 28, March 2, 3, 4, 5, 6, 9, 16, 17, 18, 19, 20, 30, and 31, April 1, 2, 3, 6, 7, 8, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, May 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27 and 28, June 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, and 30, July 1, 2, 3, 4, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, and 31, August 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and 31 and October 1, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, and 23, 1992, WTVX broadcast an episode of "WHO'S THE BOSS?," a total of Two Hundred Twenty Four (224) broadcasts. Decl. of Constance L. Thomas at ¶ 4; Plaintiff's Memorandum at 3-4.

11. On each of October 24, 25, 28, 29, 30, November 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 20, 21, 22, 25, 26, 27, 28, 29, December 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 16, 18, 20, 23, 24, 26, 27, 30, and 31, 1991, and January 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, and 31, February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and March 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, and 31, April 1, 2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, May 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, June 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, and 30, July 1, 2, 7, 8, 13, 16, 17, 20, 22, 24, 27, 29, 30, and 31, August 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and 31 and September 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, and 30, October 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, and 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 and November 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, and 20, 1992, WMPT broadcast an episode of "WHO'S THE BOSS," a total of Two Hundred Sixty Seven (267) broadcasts. Constance L. Thomas Decl. at ¶ 6; Plaintiff's Memorandum at 4-5.

12. On each of November 9, 16, 23, 26 and 30, and December 7, and 21, 1991, January 4, March 31 and April 4, and 11, and May 14 and 28, 1992, WMPT broadcast an episode of "SILVER SPOONS," a total of thirteen (13) broadcasts. Constance L. Thomas Decl. at ¶ 7; Plaintiff's Memorandum at 6.

13. On each of December 10, 11, 13, 16, 17, 18, 19, 20, 23, 26, 27, 30, and 31, 1991, and January 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, March 2, 3, 4, 5, 6, June 26 and 30, July 2, 3, 7, 10, 13, 14, 16, 24, 27, 28, 31, August 5, 6, 7, 10, 11, 12, 13, 21, 24, 26, 27, 28, 31, and September 1, 3, and 4, 1992, WABM broadcast an episode of "HART TO HART," a total of Eighty-Nine (89) broadcasts." Constance L. Thomas Decl. at ¶ 10; Plaintiff's Memorandum at 5.

14. On each of December 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 23, 26, 27, and 31, 1991, and January 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30 and 31, February 1, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, and March 2, 3, 4, 5, 6, and 7, WABM broadcast an episode of "T.J. HOOKER," a total of Seventy-One (71) broadcasts." Constance L. Thomas Decl. at ¶ 10; Plaintiff's Memorandum at 5.

E. Mr. Feltner's Authority Over the Stations

15. Mr. Feltner supervises the management of all of the Krypton International divisions, Feltner Dep. 37, moves all policy decisions for the three approves all contracts involving the stations, *Id.*, and testified that "[t]he program schedule is totally my responsibility. I take recommendations from other people, but the final decision is mine." Feltner Dep. at p. 51-52; Plaintiff's Memorandum at 6. Mr. Feltner reviews and authorizes everything broadcast on the stations. Feltner Dep. at 283-85 and 300; Plaintiff's Memorandum at 6. Station personnel adhere to the policy that only Mr. Feltner is authorized to make program changes. Feltner Dep. at 382-83; Plaintiff's Memorandum at 6.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1338(a)(b) and 1367(a).

2. Columbia seeks summary adjudication pursuant to Fed. R. Civ. P. 56(c). Mr. Feltner has raised no genuine issues of material fact that would preclude summary judgment on the issues raised in Columbia's motion.

3. Columbia owns valid copyrights in each episode of the television series "WHO'S THE BOSS?," "HART TO HART," "T.J. HOOKER," "ONE DAY AT A TIME," "SILVER SPOONS," "THE FACTS OF LIFE," and "PUNKY BREWSTER." See generally Declaration of Gregory K. Boone.

5. As the owner of the copyright of each episode of "SILVER SPOONS," "WHO'S THE BOSS?," "T.J. HOOKER," and "HART TO HART," Columbia holds the exclusive right to perform the work publicly. 17 U.S.C. § 106(4). Broadcasting a work on television is a public performance. See WGW Continental Broadcasting Co. v. United Video, 693 F.2d 622, 625 (7th Cir. 1983); 2 M. Nimmer, Nimmer on Copyright § 8.14(B).

6. The Krypton-owned and operated television stations infringed Columbia's copyrights by broadcasting episodes of "SILVER SPOONS," "WHO'S THE BOSS?," "T.J. HOOKER," and "HART TO HART" after the stations' licenses with Columbia were terminated. Paramount Pictures v. Metro Program Network, 962 F.2d 778, 779 (8th Cir. 1992). Each of the 664 broadcasts of an episode made after the program license was terminated constituted an infringement of a copyrighted work. *Id.*

7. Mr. Feltner personally participated in, indeed, caused, and materially contributed the acts constituting each infringement after ignoring repeated requests from Columbia that he cease and desist the activity. Accordingly he is jointly and severally liable for those infringements under the doctrine of contributory infringement. 3 Nimmer § 12.04(A)(3)(a).

8. In addition, Mr. Feltner had the right and ability to supervise the infringing activities and, as the sole shareholder of the company that owns the infringing stations, has a direct financial interest in that activity. Accordingly Mr. Feltner also is vicariously liable for each infringement. *E.g.*, Southern Bell Tel. & Tel., 756 F.2d at 511.

9. Columbia is entitled to damages for the multiple infringements of its copyrights in an amount to be determined at trial.

10. Mr. Feltner has neither paid nor offered evidence of facts sufficient to raise a genuine issue of material fact as to the applicability of its affirmative defenses, including failure to state a claim; unclean hands; contributory negligence;

equitable estoppel, misrepresentation; authority to broadcast programming; excused performance; and prevention of performance. Columbia, therefore, is entitled to an order adjudicating Mr. Feltner liable for copyright six hundred and sixty-four (664) infringements of Columbia's copyrighted works.

Dated this 30th day of November, 1992

DAVIS WRIGHT TREMAINE
Henry J. Tashman, Esq.
Attorneys for Plaintiff
COLUMBIA PICTURES
TELEVISION, INC.

By: /s/
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